

IN THE COURT OF APPEALS OF IOWA

No. 3-1143 / 12-2231
Filed January 9, 2014

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEITH CORNELL GRESHAM,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, James M. Drew, Judge.

Keith Gresham appeals his conviction for burglary in the first degree.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary A. Triick, Assistant Attorney General, Carlyle D. Dalen, County Attorney, and Rachel A. Ginbey, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mullins and McDonald, JJ.

VOGEL, P.J.

Keith Gresham appeals his conviction for burglary in the first degree, claiming the conviction was not supported by substantial evidence, and alternatively, the conviction was contrary to the weight of the evidence. Gresham also argues in his pro se brief that trial counsel was ineffective for failing to file a motion to dismiss based on the failure of a judge to approve the trial information. Because we conclude sufficient evidence supports the guilty verdict, the conviction was not contrary to the weight of the evidence, and trial counsel breached no essential duty by not raising a meritless claim, we affirm.

I. Factual and Procedural Background

On May 17, 2012, Gresham was at the home of Brenda Askildson in Mason City, socializing with former girlfriend, Jill Walker, and others. Alcohol and crack cocaine were consumed by all present. Gresham left Askildson's residence at about 10:00 p.m., then returned at approximately 4:00 the next morning. The front door was locked, but Gresham broke the glass door and gained entry. At trial, Askildson testified she had been asleep on the couch but awakened and opened the door at the same time Gresham broke the glass.

Gresham, in an agitated state, demanded to know where Walker was and threw beer cans at Askildson. Askildson informed Gresham that Walker and another male identified as "Sammy" were in the bedroom. Gresham went to the bedroom, told "Sammy" to leave, then proceeded to beat Walker with his fists and a belt, leaving her with a broken nose, severe bruising, and a fractured vertebra.

Fearing for her own safety, Askildson ran to a nearby gas station, locked herself in the restroom, and called 911. She refused to come out of the restroom until police arrived and identified themselves as officers. She informed the police she was fearful Gresham would kill her if he saw her. At the gas station, Askildson told her good friend, Sheila Wiles, that Gresham broke into the residence because Askildson had refused to open the door.

Gresham was arrested and charged with burglary in the first degree, in violation of Iowa Code sections 713.1 and 713.3 (2011), and willful injury causing bodily injury, in violation of Iowa Code section 708.4(2). Gresham waived his right to a jury trial and proceeded with a bench trial on October 3, 2012. On October 26, the district court found Gresham guilty of burglary and the lesser included offense of willful injury. Gresham appeals.

II. Sufficiency of the Evidence

Gresham asserts the burglary conviction was not supported by sufficient evidence as several facts undermine his conviction: he was in the residence earlier in the evening, with permission; he had a key to the residence so he could look after Askildson's pets when she was away; Askildson testified she let Gresham in at the same time he broke the window; and Askildson made a written statement to the police that Gresham merely "busted the front window out." He claims these facts undermine the conviction because the "breaking" element was not proven, so the burglary conviction cannot be sustained. Gresham further asserts he did not have the specific intent to assault Walker when he entered the residence, given they argued before he began beating her.

We review challenges to the sufficiency of the evidence for correction of errors at law. *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa 2005). We view the record in the light most favorable to the non-moving party—that is, the State—and make all legitimate inferences and presumptions that may be reasonably deduced from the evidence. *Id.* If substantial evidence supports the verdict, we will affirm. *Id.* Evidence is substantial if it would convince a reasonable trier of fact the defendant is guilty beyond a reasonable doubt. *Id.* We review the decision following a bench trial in the same manner as we review a jury’s decision. *State v. Weaver*, 608 N.W.2d 797, 803 (Iowa 2000).

The crime of burglary occurs when:

Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person’s right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

Iowa Code § 713.1. Burglary in the first degree is committed when, “while perpetrating a burglary in or upon an occupied structure in which one or more persons are present, any of the following circumstances apply: . . . c. The person intentionally or recklessly inflicts bodily injury on any person.” *Id.* § 713.3(1)(c).

We find sufficient evidence supporting the district court’s conclusion there was a breaking. The broken window is strong circumstantial evidence of a forced entry, particularly when it is coupled with Wiles’s testimony she had been to Askildson’s home many times before and knew the glass would not break easily if someone was simply knocking. Also, there is Wiles’s testimony, admitted for the truth of the matter asserted, that Askildson told her: “Gresham had come to

the house, he was angry and screaming, and he broke the window on her front door because Brenda refused to open the door for him so he could get into the house.”

This is contrary to Askildson’s testimony at trial, where, when asked how Gresham entered her home, she stated:

A: I opened the door. As he was going on the window and knocking on the window, the pane glass and that shattered and that was at the same time when I was trying to open it.

Q: So the glass on the front door did get broken? A: Yes.

Q: And then you opened the door for the Defendant? A: I—like at the same time.

However, the district court made a specific credibility determination favoring Askildson’s statement to Wiles just after the incident—when she appeared to be very frightened—rather than her trial testimony. With regard to Askildson’s credibility, the court stated:

It became immediately apparent that Ms. Askildson was a reluctant witness. She appeared very uncomfortable and frequently looked down when answering questions about the circumstances surrounding the defendant’s entry into her home. Her overall demeanor was consistent with what one would expect from a person fearful of retaliation. The court was immediately skeptical when she testified that she opened the door to her residence “at the same time” the defendant broke out the glass in the door.

Shortly after the incident occurred Ms. Askildson remained in a highly emotional state. Sheila Wiles, a very close friend of Ms. Askildson, described her as “terrified” and “scared to death.” Ms. Askildson told her close friend that she refused to open the door so the defendant broke in. The court considers this statement by Ms. Askildson to be more credible than her trial testimony for two reasons. First, a “present sense impression” is considered to be reliable because there is little or no time for calculated misstatement. The same can be said about an “excited utterance.” Second, the broken glass, time of day, and the defendant’s enraged state are consistent with an unlawful entry and corroborate what Ms. Askildson told Ms. Wiles. Based on this evidence the court is firmly convinced that the defendant broke into the house without permission or authority.

“Determinations of credibility are in most instances left for the trier of fact, who is in a better position to evaluate it.” *Weaver*, 608 N.W.2d at 804. Not only is the district court’s assessment here supported by evidence in the record, but the court was in the best position to evaluate Askildson’s credibility. Consequently, Wiles’s testimony, combined with Gresham’s enraged state when entering the residence and the broken glass, provide sufficient evidence to support the breaking element of the burglary conviction.

With regard to the specific intent element, the record supports the conclusion Gresham had the specific intent to assault Walker when he entered the residence. Proof of intent is usually offered in the form of circumstantial evidence, and the fact finder may infer intent from the circumstances of the defendant’s entry and the acts preceding and following the entry. *State v. Finnel*, 515 N.W.2d 41, 42 (Iowa 1994). Walker testified that once Gresham entered the bedroom:

He told Sammy to get the hell out of there. And he started beating me Hitting me, kicking me, tearing my hair out. He tried to choke me. He had me on the ground. Repeatedly beating me with his belt, punching me in the face, kicking me in the side.

Askildson testified Gresham “wasn’t real happy” when he came back, as evidenced by his tone of voice and the fact he threw beer cans at her once he entered the home. The district court properly inferred from all the evidence presented that Gresham had the specific intent to assault Walker at the time he broke into Askildson’s residence.

Moreover, even if Gresham did not have the intent to assault Walker when he unlawfully entered the residence, the evidence clearly establishes that he

formed that intent at some point as he in fact assaulted her while unlawfully in the residence. This would be enough to satisfy the intent element of first degree burglary. See *State v. Dible*, 538 N.W.2d 267, 270–71 (Iowa 1995) (finding the defendant guilty of first degree burglary because he was in the residence unlawfully then assaulted the victim). Therefore, sufficient evidence exists to sustain Gresham’s conviction for burglary in the first degree.

III. Weight of the Evidence

For the same reasons Gresham argues sufficient evidence does not exist to support his burglary conviction, he asserts, in the alternative, that the verdict is contrary to the weight of the evidence such that a new trial is necessary.

We review the denial of a defendant’s motion for new trial for an abuse of discretion. *State v. Adney*, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001). A new trial should be granted only when the verdict was “contrary to the weight of the evidence and a miscarriage of justice may have resulted.” *Id.* at 253. The weight of the evidence refers to a determination by the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). New trials are only granted in exceptional cases in which the evidence preponderates heavily against the verdict. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998).

Upon review of the record, the district court did not abuse its discretion in denying Gresham’s motion for new trial, given the weight of the evidence supports the guilty verdict issued by the district court. This evidence includes the broken glass, Gresham’s enraged state when he entered the home, the beating that immediately followed his entry into the bedroom, and Askildson’s statement

to Wiles that Gresham broke into the residence because she would not let him in. Although Askildson gave contrary testimony at trial, and further testified Gresham had a key to her residence, this does not outweigh the other evidence and credibility findings such that the guilty verdict is contrary to the weight of the evidence. Therefore, the district court properly denied Gresham's motion for new trial, and we affirm.

IV. Ineffective Assistance of Counsel

In his pro se brief, Gresham asserts trial counsel was ineffective for failing to object to the filing of the trial information. Gresham claims that because the trial information was not signed by a judge it was not properly filed within the meaning of Iowa Rule of Criminal Procedure 2.33(2) and asserts the case should have been dismissed on speedy trial grounds.

A defendant may raise an ineffective-assistance claim on direct appeal if the record is adequate to address the claim. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). We may either decide the record is adequate and issue a ruling on the merits, or we may choose to preserve the claim for postconviction proceedings. *Id.* We review ineffective-assistance-of-counsel claims de novo. *Id.* To succeed on this claim, the defendant must show, first, that counsel breached an essential duty and, second, that he was prejudiced by counsel's failure. *Id.* Counsel has no duty to raise a meritless objection. *Id.*

Gresham's claim here is without merit. There is no evidence the trial information was not properly approved by a judge. Moreover, the trial information was filed five days after Gresham's arrest, well within the forty-five-day time frame mandated by Iowa Rule of Criminal Procedure 2.33(2)(a).

Therefore, counsel had no duty to raise a meritless objection regarding the trial information, and Gresham's claim is without merit.

Having considered all Gresham's claims, we affirm his convictions for burglary in the first degree and willful injury.

AFFIRMED.